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Supreme Court of the United States

OCTOBER TERM, 1957

No. 804

JIMMY JAMES BOUZIDEN, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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Supreme Court of the United States

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No.

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v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the Western District of Oklahoma, convicting the petitioner for a violation of the Universal Military Training and Service Act.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed, *infra,* pages 38 to 46, as Appendix A. There is no opinion of the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1958. See Appendix B, *infra*, page 47.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P. Title 18, Section 3231, U. S. C. confers jurisdiction on the trial court.

QUESTIONS PRESENTED

I.

Whether the denial of the conscientious objector classification by the appeal board was without basis in fact, making the final I-A classification arbitrary and capricious.

II.

Whether the recommendation of the Department of Justice upon the first appeal, that the conscientious objector status could be denied because of petitioner's belief in self-defense and theocratic warfare, was a denial of procedural due process of law before the appeal board because it was not retracted by the Department of Justice before the final I-A classification.

III.

Whether there was a denial of procedural due process of law before the appeal board by the Department of Justice in failing to supply petitioner the full FBI report so that he could make use of all the favorable evidence in said report in presenting his claim for classification as a conscientious objector to the appeal board and also in failing to supply the appeal board the full FBI report so that it could make use of all the favorable evidence in said report in considering petitioner's claim and in classifying him.

IV.

Whether petitioner was denied procedural due process of law before the appeal board and in the Department of Justice by the misleading and false statements made by the hearing officer of the Department of Justice, that the conviction for bootlegging of his uncle who had reared him would not be relied upon by the Department of Justice in making its recommendation to the appeal board, whereas such statements were relied upon by the Department.

V.

Whether petitioner was denied procedural due process of law by the Department of Justice before the appeal board because the recommendation by it to the appeal board contained unfair representations and illegal grounds for the denial of the conscientious objector claim and made serious omissions of facts favorable to the petitioner.

VI.

Whether reversible error was committed by the trial court in excluding from evidence as absolutely privileged the longhand notes of the hearing made by the hearing officer and also the typewritten report of the hearing officer to the Department of Justice upon the hearing conducted by him, which were demanded to prove a denial of due process of the hearing and before the appeal board and also to use in cross-examination of such hearing officer who testified as a witness for the Government.

VII.

Whether the trial court committed reversible error in excluding from the evidence as absolutely privileged the original full FBI investigative reports of the inquiries when they were offered for the material and relevant purpose of showing that the petitioner was denied procedural due process of law before the appeal board in that favorable evidence supporting his conscientious objector claim had not

been fully and adequately summarized and presented to the appeal board by the Department of Justice.

STATUTES AND REGULATIONS INVOLVED

Section 6 (j) of the Universal Military Training and Service Act (62 Stat. 604, 612, 622; 65 Stat. 75, 86 (50 U. S. C. App. § 456 (j))) is involved here. The pertinent part reads as follows:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate ap-

peal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * * If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *"

Section 1 (c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451 (c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) 65 Stat. 75.

Sections 1622.11, 1622.14, 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Selective Service Regulations (32 C. F. R. § 1602 *et seq.*) are involved. These regulations are extensive; so they are printed as Appendix C, *infra,* at pages 48 to 50.

STATEMENT OF THE CASE

Petitioner seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit, affirming a judgment of the United States District Court for the Western District of Oklahoma. (See Appendix B, *infra* at page 47.) The judgment of the District Court was entered after trial without jury finding petitioner guilty of refusing to submit to induction into the armed forces in violation of the Universal Military Training and Service Act. [R. 10, 11]

Petitioner was indicted for refusal to submit to induction into the armed forces on July 25, 1956, at Oklahoma City, Oklahoma, contrary to the Universal Military Training and Service Act. [R. 4-5] He pleaded not guilty. [R. 11] On April 17, 1957, he consented to a trial to the court without a jury. Evidence was heard. [R. 11] At the close of the evidence a motion for judgment of acquittal was made that was overruled, followed by a finding of guilty. [R. 11-12] Petitioner was sentenced to serve two years in the custody of the Attorney General. [R. 10, 11] He duly and timely filed his notice of appeal to the Court of Appeals [R. 10-11]

The Court of Appeals affirmed the judgment of the trial court by judgment entered on January 29, 1958. (Appendix B, *infra,* page 47.) An opinion was written stating reasons for the affirmance. (Appendix A, *infra,* pages 38 to 46.)

Bouziden registered with his draft board on February 21,

1951. [R. 88] On March 4, 1952, he filed a classification questionnaire, showing that he was a minister and had been since July, 1942, in the organization known as Jehovah's Witnesses. [R. 89] He showed that he was born at Auburn, California, on February 21, 1933. [R. 89] The conscientious objector blank of the form was signed by him certifying that he was opposed to participation in war, because of religious training and belief. [R. 90] He sought a minister's exemption, or a IV-D classification. [R. 90]

Bouziden filed a conscientious objector form on March 11, 1952. [R. 90] This form showed that he was opposed to both combatant and noncombatant military service and that he was entitled to be exempted from all training and service, Class I-O, the conscientious objector classification. [R. 94-97]

The local board classified him I-A. [R. 90] On April 16, 1952, he was reclassified I-A following his first personal appearance. He appealed his case and his file was sent to the district appeal board. [R. 91] On May 21, 1952, his case was referred to the Department of Justice for an advisory recommendation on his conscientious objector claim. [R. 91]

Following investigation and hearing in the Department of Justice the Assistant Attorney General recommended to the appeal board that Bouziden be denied his conscientious objector status because he believed in theocratic warfare and in self-defense, being willing to fight to protect himself and his fellow servants of God. [R. 98-99] The Department of Justice recommended that because of these religious beliefs the petitioner was not entitled to the conscientious objector classification. [R. 98-99] Basing their decision on this recommendation the appeal board classified Bouziden in I-A. [R. 91] He was ordered to submit to induction on May 25, 1953. He reported and refused to submit, which resulted in his prosecution. [R. 92] This was dismissed on April 21, 1955. The State Director then ordered the case of Bouziden reopened and directed that petitioner be reprocessed. [R. 92]

On May 4, 1955, the local board reclassified Bouziden I-A. [R. 92] Following a personal appearance he was again classified I-A. [R. 92-93] From this he appealed, resulting in his case being again referred by the appeal board to the Department of Justice for investigation, hearing and recommendation upon the conscientious objector claim. [R. 93]

Following the investigation petitioner was sent copies of the résumé of the FBI investigations dated July 16, 1952, and September 22, 1955. He was notified that he was to appear before Maurice Evenson, a hearing officer of the Department of Justice, on January 6, 1956. [R. 41, 121]

On December 21, 1955, Bouziden wrote the hearing officer that he wanted a copy of the original FBI report sent to him and to the appeal board, to find out "all of the favorable as well as the unfavorable evidence." [R. 121] As to the adverse evidence he said he needed the FBI report so as to "identify the source of information and know who the informants are in order to be able to answer the information or challenge the informants because of evil motive, lack of knowledge or other grounds." [R. 121] He concluded that he did not want to call informants or cross-examine them or delay the proceedings. [R. 122] The FBI report was not supplied to Bouziden or to the appeal board, as requested. [R. 58-59]

The résumé of July 16, 1952, contained prejudicial and adverse statements. The members of the local draft board were reported to believe that Bouziden "was merely trying to evade military service." [R. 110] Neighbors believed that Bouziden could not be a conscientious objector because he was reared "in the home of his uncle who was a convicted bootlegger in Woods County, Oklahoma." [R. 111] Another informant stated that Bouziden was "of questionable character and reputation and that his entire family are of poor character and reputation in the community." [R. 111] These statements were repeated by former Woods County officials and neighbors. [R. 111-112]

Another informant stated that Bouziden used profanity

on several occasions. Another informant, an employee of a company in Wichita, Kansas, said he recalled petitioner drinking and visiting pool parlors. He had never seen the petitioner drink more than two beers but had seen him drink a bourbon and soda at a company party. [R. 112-113]

The résumé dated September 22, 1955, showed that Bouziden lived in an apartment house operated by a woman "who was later arrested and convicted for operating an abortion ring on the premises." [R. 113] She was shown to have owned several apartment houses in the one block where he lived. [R. 113] A police official of Wichita, Kansas, reported that two of the landlady's apartments were rented where "five women were found on the premises who were there to arrange for abortions." [R. 113] The police official also reported that a young lady "was found in the hallway of the bachelor apartments, located in the same block." [R. 113] This woman had an arrest record on morals charges and had been convicted of fornication. [R. 113] Reference was made to the conviction and imprisonment of the landlady in the Lansing State Prison. [R. 113]

The convicted woman was interviewed by the FBI in prison. [R. 114] She said that petitioner began living on her premises in "her motel in late 1952." Later petitioner and his brother moved "in to one side of a duplex house which she owned in the block where the aforementioned raid took place." [R. 114] The convicted woman reported to the FBI that a girl came to her in 1952 who was pregnant. The woman said she took care of the girl and helped arrange the adoption of her baby. She afterward had the girl work for her as "manager of the motel in which the registrant and his brother lived." [R. 114] The woman stated that petitioner's "brother began keeping company with her" and that the three of them went out together, but that petitioner was not known "to have a date with any girl." [R. 114] The landlady is reported as saying: "The young girl became pregnant again by the registrant's brother and went to Oklahoma to have the baby." [R. 114] The landlady said

that she did not know whether petitioner "was aware that his brother was intimate with the young girl" and whether "the registrant or his brother knew that she operated an abortion ring and kept girls that were illegitimately pregnant in her home, while the registrant and his brother rented an apartment from her in the same block." [R. 114]

The résumé then quoted the young girl as saying that "she never had any dates with the registrant." [R. 114] She added that she "knew of no bad habits which the registrant had and stated that she has had no contact with him for about the past four years." [R. 114] The résumé shows that the young woman who was found in the hallway of the bachelor apartments and who was convicted of fornication advised that she was not "acquainted with any party by the name of Bouziden." [R. 115] The résumé refers to a statement by another girl who "had heard a rumor about three years ago that the young girl, who was not married, was pregnant." [R. 115] This woman saw the girl who got pregnant in a night club with "two dark-complexioned young men, one of whom she thought was the registrant's brother." [R. 115]

A police official of Wichita was reported saying that a warrant had been issued against the petitioner for failure to appear in answer to a parking ticket issued on August 9, 1954. [R. 116] He reported a second traffic warrant dated March 11, 1954, for operating a car with "an illegal muffler on his automobile." [R. 116] The résumé states that the police records at Pratt, Kansas, showed petitioner "was arrested on October 4, 1954, for running a stop sign" and that petitioner was "very belligerent." [R. 116]

The résumé later on states that one informant at Pratt, Kansas, a co-worker with petitioner, "at the end of a day when both he and the registrants [sic] were hot and dry, and at his suggestion, they visited a bar and had a beer." [R. 117-118] This informant recalled that Bouziden stated "he formerly lived in an apartment of a lady in Wichita, who was later arrested for operating an abortion ring." [R. 118]

The résumé quotes a member of the draft board to the effect that petitioner "was not sincere in his conscientious-objector claim." [R. 119] The board member reported to the FBI that petitioner refused a conscientious objector classification, "claiming to be a minister in Jehovah's Witnesses and wishing a IV-D classification." [R. 119]

The FBI résumé stated: "It is noted that most persons interviewed believed that the registrant's home environment, being raised by an uncle who was a convicted bootlegger, is inconsistent with his claim of being a conscientious objector, based upon his religious training and beliefs." [R. 120]

On January 4, 1956, the petitioner by letter replied to the résumé. He denied that the draft board members could judge his motives. [R. 124] He complained of the résumé judging him because of the conduct of other persons. He asked a question about the fairness of this, saying: "The reason I ask this is because this is exactly what the résumé has done to me." [R. 124] He explained that his uncle, who had been convicted of bootlegging, had changed since "the early forties" when he became one of Jehovah's Witnesses. [R. 124] He also explained about his irregular attendance at meetings of Jehovah's Witnesses because of his having to travel from different places, which kept him away from his local congregation. [R. 125]

Concerning the statement made in the second résumé dated September 25, 1955, about the woman convicted of operating an abortion ring he said: "It is true that I resided there for a short time but, I knew nothing of her activities or personal dealings. It was not until I moved to Pratt, Kansas and a good deal of time later that through the Newspaper that I learned of what she had done." [R. 125] The petitioner added that his brother had been accused of a serious offense in his dealings with the young girl who became pregnant and then added: "I recall that he dated a girl which may be the one mentioned, I have no knowledge

of his personal affairs and am unable to answer for him." [R. 125]

A hearing was conducted before the hearing officer of the Department of Justice at Pueblo, Colorado, on January 6, 1956. [R. 129] Petitioner was accompanied by his brother, Richard Bouziden, and Petitioner's wife, Jaree. The hearing officer told petitioner that he had some questions that he would like to ask him and that Bouziden would merely answer the questions put to him. [R. 15, 33] The hearing officer asked Bouziden several questions about his background. [R. 33] He inquired about his occupation and earnings. [R. 33-34] He asked Bouziden if he smoked and Bouziden replied that he did not. [R. 15, 34] He then asked Bouziden if he was a drinker and he said no. [R. 15, 34, 59] He then asked Bouziden if he had ever been arrested and Bouziden replied he never had been. [R. 15, 34]

Bouziden admitted to the hearing officer that he drank beer now and then. [R. 17, 36-37, 59] Petitioner was asked what church he belonged to and he told the hearing officer Jehovah's Witnesses. [R. 15, 34] The hearing officer wanted to know how a person became one of Jehovah's Witnesses, and Bouziden told him that it was through study of the Bible, attending meetings and through baptism, and that was how "he got his ordination." [R. 15-16, 34] The hearing officer then asked Bouziden if he had ever been arrested and he said that he had not. [R. 15] He asked the petitioner whether he refused to bear arms. Bouziden told him that as one of Jehovah's Witnesses he did refuse. [R. 34]

The hearing officer asked Bouziden whom he was living with when he became one of Jehovah's Witnesses and he answered that it was his aunt and uncle, who had raised him. [R. 34] The hearing officer wanted to know if Bouziden believed in self-defense and whether he would defend himself and his family. Bouziden answered that he would. [R. 34] The hearing officer then wanted to know if Bouziden believed in participation in theocratic warfare. Bouziden told him that while he believed in theocratic warfare he

would not participate in it since Jehovah God and Christ Jesus "would fight the final battle." [R. 35]

The hearing officer then inquired about petitioner's record in the ministry as one of Jehovah's Witnesses. [R. 35] He further inquired if petitioner was a minister and if his brother was a minister. Bouziden told him that they were ministers. [R. 35]

The hearing officer wanted to know about the religious youth program of Jehovah's Witnesses. Bouziden told him that they attended the theocratic ministry school and meetings of Jehovah's Witnesses. [R. 35-36]

Upon the hearing the hearing officer informed the petitioner that he had seen in the résumé of the FBI report about the conviction of his uncle for bootlegging and added that it "isn't important, that we wouldn't even discuss that." [R. 60]

Upon the trial of this case the hearing officer admitted that he had possession of and used the original, full FBI report. He had read it before the hearing and compared it with the résumé. [R. 51] He testified that the full report was three or four times more voluminous than the summary. [R. 50-51] The petitioner subpoenaed the full FBI report which was called for at the trial by the petitioner. [R. 51-56, 81-82] The court sustained the objection of the Government that the documents were privileged and excluded the FBI report. [R. 53-56, 81-82] The FBI report was offered by the petitioner for the purpose of showing that favorable and beneficial evidence supporting the conscientious objector claim of the petitioner was withheld from the appeal board and the original FBI report was material so that it could be compared with the résumé made by the Department of Justice to determine whether favorable evidence had been withheld from the appeal board. [R. 54-55] The trial court refused to make an in camera inspection. [R. 46-47, 55-56]

The Department of Justice wrote a letter to the appeal board recommending against sustaining the conscientious objector claim. [R. 128-131] The Department epitomized

the report of the hearing officer based on the hearing of January 6th. [R. 129-131] The letter quoted the hearing officer as finding that Bouziden (1) "appeared to be evasive"; (2) "seemed to lack a knowledge of the Bible in general"; (3) first said that he did not drink and then admitted that he had drunk intoxicating liquor and still drinks beer; (4) first stated he never had been arrested and later admitted that he had been in trouble with the police, referring to the police records of Wichita and Pratt, Kansas; (5) stated he believed in self-defense and that he would "take a stand against foreign invaders in the protection of himself, his family, his property and his brothers in the faith"; (6) stated that all of Jehovah's Witnesses were ministers; and (7) was not against noncombatant service "as such but felt that he could not participate in it because it would interfere with his ministerial duties." [R. 129-130]

The Department of Justice summarized the report of the hearing officer about the testimony given by Richard Bouziden, brother of the registrant, finding that the brother said that (1) petitioner should learn more about the Scriptures; (2) he and petitioner drank alcoholic beverages "once in a while" and (3) after being pressed, admitted that he was convicted for violation of the draft law in 1944 and spent two years in the penitentiary at El Reno. [R. 130-131]

Upon the trial petitioner and his two witnesses denied that he had appeared to be evasive. [R. 16, 17, 36, 59] Petitioner also testified that the hearing officer did not ask about any Bible questions. [R. 17, 36, 59] Petitioner and his witnesses also testified that the report by the hearing officer on drinking of intoxicating liquor was incorrect. They said that the hearing officer asked Bouziden if he was a drinker and he said no, admitting that he drank beer occasionally but not hard liquor. [R. 17, 36, 59]

Petitioner and his witnesses also said that the hearing officer questioned Bouziden about his being arrested, which he denied, saying that he had never received any sort of

summons but only traffic tickets, which were not arrests, as stated in the résumé. [R. 18, 37, 60] Petitioner and his witnesses testified that the hearing officer was wrong when he reported that petitioner was unable to answer how one became one of Jehovah's Witnesses but that Bouziden did answer the question thoroughly and completely. [R. 18, 60-61] Petitioner and his witnesses explained that the hearing officer was in error about Bouziden's record card not having been transferred from Pratt, Kansas, to Colorado Springs. [R. 20, 61]

The hearing officer was subpoenaed and put on the witness stand by the petitioner, who demanded that he produce his longhand notes at the hearing and also to produce a copy of his typewritten report to the Department of Justice in Washington about the hearing conducted by him at which the petitioner appeared and gave evidence. [R. 41-48] The Government objected that the documents were privileged. [R. 43, 45, 48] The petitioner showed that such documents were needed also to show that the report of the hearing was biased and one-sided and contained misrepresentations as to the conduct of the petitioner [R. 43-44] and that such documents were material and relevant for that purpose. [R. 43-50] The court sustained the objection. [R. 50, 80]

The hearing officer was recalled to the witness stand as a witness for the Government for the purpose of contradicting the testimony of the petitioner and his witnesses about what took place at the hearing. [R. 82-83] On cross-examination it developed that the hearing officer had made longhand notes as to what was said at the hearing and in his typewritten report to the Department of Justice he also recorded what took place at the hearing. [R. 83-85] Petitioner then called upon the court to compel the witness to produce his longhand notes and the typewritten report for the purpose of testing the credibility of the witness. [R. 84-85] The court sustained the objection of the Government and refused to compel the production of the documents for use of counsel in cross-examining the witness. [R. 85-86]

The Department of Justice, in its recommendation to the appeal board, also summarized the conclusions of the hearing officer that petitioner (1) "failed to show sincerity and good faith" through his general appearance and conduct at the hearing and (2) was not opposed to military service "by reason of his religious training and belief." [R. 131]

The Department in conclusion recommended to the appeal board that the claim be not sustained, for all the reasons set forth in the recommendation. [R. 131]

A copy of the recommendation of the Department of Justice was mailed to petitioner on March 13, 1956. [R. 133] Bouziden said that he figured that since the Department of Justice had already found against him and recommended to the appeal board that his claim be denied "there just wasn't any use" to make any reply. [R. 65] He merely wrote the appeal board as follows: "I hereby request that my letters and files be considered by the appeal board at the next meeting." [R. 134] Through an earlier letter he had answered the unfavorable evidence in the résumé relied upon by the Department of Justice. [R. 72, 124-125]

On June 21, 1956, the file was returned from the appeal board to the local board with a I-A classification by the appeal board. This constituted a denial of the conscientious objector claim as recommended by the Department of Justice. [R. 93] On July 11, 1956, the local board ordered petitioner to report for induction on July 24, 1956. On July 25, 1956, petitioner refused to submit to induction into the armed forces. [R. 136-137]

REASONS FOR GRANTING THE WRIT

I.

The documentary evidence submitted by Bouziden establishes that he had sincere and deep-seated conscientious objections against his participation in combatant and noncombatant military service that were based on his "relation to a Supreme Being involving duties superior to those arising

from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry. [R. 94-97, 101-103, 128-131]

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeals. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. See *Jessen* v. *United States,* 212 F. 2d 897 (10th Cir. 1954), where the court below (after following *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. 1953)) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of the courts of appeals with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Pine* v. *United States,* 212 F. 2d 93 (4th Cir. 1954); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. 1953); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. 1953); *Jewell* v. *United States,* 208 F. 2d 770 (6th Cir. 1953); *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. 1954); *Weaver* v. *United States,* 210 F. 2d 815 (8th Cir. 1954); *Jessen* v. *United States,* 212 F. 2d 897 (10th Cir. 1954); *United States* v. *Close,* 215 F. 2d 439 (7th Cir. 1954); *United States* v. *Wilson,* 215 F. 2d 443 (7th Cir. 1954).

It may be argued that, because petitioner had been involved in traffic violations and had occasionally drunk beer and was known at one time to take one drink of bourbon

whisky, he is not a conscientious objector. [R. 112-121] This contention has been specifically considered and rejected in *Rempel* v. *United States,* 220 F. 2d 949 (10 Cir. 1955), which approved a similar holding made in *Chernekoff* v. *United States,* 219 F. 2d 721 (9th Cir. 1955). These peccadillos of the petitioner do not, therefore, give any basis in fact for the denial of the conscientious objector status to the petitioner. The decision below conflicts with these two cases.

It may also be argued that, because petitioner was not up to or above the average in ministerial activity of Jehovah's Witnesses, such shortcomings on his part show that he is not entitled to the conscientious objector classification. [R. 129-131] This point was specifically considered and rejected in *Riles* v. *United States,* 223 F. 2d 786 at page 793 (5th Cir. 1955). See the last paragraph of the opinion in that case.

In the event that this Court does not find a conflict between the decision of the court below and the above-cited decisions by other courts of appeals, then it is submitted that whether the petitioner was denied the full conscientious objector status without basis in fact by the appeal board is an important question of wide public and national importance in the administration of the draft law sufficient to warrant the granting of the writ of certiorari in this case. The identical question was stated in the petition as grounds to warrant the granting of the writ in *Witmer* v. *United States,* 348 U. S. 375 (1955). This Court found it important enough to grant the writ in that case. The importance of the same question raised in that case was basis for granting the writ there. By force of the same reason it should be held again to be sufficient reason to grant the writ here.

II.

The holding of the court below, that the recommendation of the Department of Justice to the appeal board that the conscientious objector status could be denied to the petitioner because of his belief in self-defense and theocratic

warfare, is out of harmony with the holding of this Court in *Sicurella* v. *United States*, 348 U. S. 385 (1955). The reasons stated by the court below for this holding appear in Appendix A, *infra*, at pages 45 to 46.

The first recommendation of the Department of Justice to the appeal board was that the petitioner was not entitled to the conscientious objector classification because he believed in self-defense and in theocratic warfare. [R. 98-99] In the second hearing in the Department of Justice the hearing officer emphasized the belief of petitioner in theocratic warfare. [R. 16, 34-35] He also emphasized the willingness of the petitioner to defend himself. [R. 34] The recommendation of the Department of Justice to the appeal board upon the first appeal, dated December 4, 1952, was in the draft board file that went up to the appeal board on the second appeal in 1956. [R. 97-99] In the second recommendation by the Department of Justice reference is made to the first hearing "before another Hearing Officer." [R. 128] In the final recommendation to the Department of Justice the attention of the appeal board is specifically directed to the beliefs of the petitioner in theocratic warfare and in self-defense. [R. 128-129] Nowhere in the final recommendation by the Department of Justice to the appeal board is the appeal board directed not to consider petitioner's belief in theocratic warfare or self-defense. [R. 128-131] It must be assumed and presumed that the appeal board relied upon belief of the petitioner in self-defense and in theocratic warfare in reaching its opinion that petitioner was not entitled to classification as a conscientious objector.

The Act and the Regulations do not permit the Department of Justice to recommend, or the appeal board to accept, the recommendation, that willingness to defend oneself or belief in theocratic warfare is basis in fact for the denial of the conscientious objector status.

Section 6 (j) provides for the recommendation of the Department of Justice. This is implemented by Section 1626.25 of the Regulations. These make the recommendation

a vital link in the chain of administrative proceedings. It is necessary that the Department of Justice proceedings be in accordance with law; otherwise the draft board proceedings are void.—*Sicurella* v. *United States,* 348 U. S. 385 (1955).

The refusal by the Department of Justice to follow the definition of a conscientious objector fixed by Congress in the Act was equivalent to a complete denial of any hearing at all. A "hearing proceeding upon an erroneous theory . . . is no better than no hearing at all."—*Shepherd* v. *United States,* 217 F. 2d 942, 946 (9th Cir. 1954); see also *Sicurella* v. *United States,* 348 U. S. 385 (1955).

In the event that the Court does not find that the holding of the court below is out of harmony with *Sicurella* v. *United States,* 348 U. S. 385 (1955), then, it is submitted, this is an important question of wide public and national importance in the administration of the draft law sufficient to warrant the granting of the writ in this case.

III.

An important question in the administration of the draft law is here presented to this Court for determination which has not been decided by this Court but which should be determined by it. It is whether the Department of Justice was required to supply petitioner with the full FBI report so that he could make use of all of the favorable evidence in said report supporting his claim for classification as a conscientious objector.

The Department of Justice denied the petitioner procedural due process of law by failing to send to the appeal board the full FBI report so he could make use of all the favorable evidence given by informants and other persons interviewed by the FBI in the course of the investigation of the conscientious objector claim of petitioner, as requested by petitioner. [R. 109] This constituted a denial of a full and fair hearing before the appeal board contrary to Section 6 (j) of the Act, the Regulations and the Constitution of the United States.

The testimony of the hearing officer, who had possession of the original FBI report and compared it with the summary made, showed that there was considerable material omitted from the summary. He said that the original report was three or four times as voluminous as was the summary. [R. 50-51] This shows that there was material omitted. Petitioner can safely argue that the record shows that favorable evidence was omitted. The holding of the court below that *United States* v. *Nugent,* 346 U. S. 1 (1953), was not overruled or modified by *Jencks* v. *United States,* 353 U. S. 657 (1957), is explained in the opinion of the Court of Appeals at pages 40 to 43, *infra,* Appendix A.

It is true that in the final recommendation of the Department of Justice to the appeal board it is implied that the evidence gathered by the FBI report appears in the résumé. But nowhere in the résumé or the recommendation does it appear that the résumé contains a summary of all the favorable evidence turned up by the FBI investigation. The Court must speculate to say that the résumé does contain all of the favorable evidence. This Court has prohibited any speculation in determining whether the draft boards and the Department of Justice have complied with the procedural due process requirements.—*Simmons* v. *United States,* 348 U. S. 397, 404-406 (1955); *Gonzales* v. *United States,* 348 U. S. 407, 414-417 (1955); compare *Steele* v. *United States,* 240 F. 2d 142 (1st Cir. 1956).

It is submitted therefore that the holding of the court below is an erroneous holding. The exclusion of the documentary evidence from the record by the Department of Justice, and the Department's withholding it from the appeal board, constituted a deprivation of procedural due process of law. It was for the appeal board, not the Department of Justice, to say whether or not the evidence was relevant or material. —*White* v. *United States,* 215 F. 2d 782, 789-790 (9th Cir. 1954); cert. denied 348 U. S. 970 (1955). The Department of Justice performed only an advisory function.—Com-

pare *United States* v. *Nugent*, 346 U. S. 1 (1953); *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir. 1952).

In *United States* v. *Nugent*, 346 U. S. 1 (1953), it was held that providing a summary of the unfavorable evidence to the registrant was enough. But the Court in that case did not rule upon the question of whether or not all the favorable evidence appearing in the FBI report should be submitted to the appeal board. The reason why the favorable evidence should be considered by the appeal board is that the Department of Justice made an adverse recommendation to it. It was the responsibility of the appeal board to consider all the favorable evidence turned up by the FBI in its inquiry because such favorable evidence may have exculpated the petitioner from the adverse recommendation to the appeal board.—*White* v. *United States*, 215 F. 2d 782, 789-790 (9th Cir. 1954); cert. denied 348 U. S. 970 (1955).

This Court ought to reconsider *United States* v. *Nugent*, 346 U. S. 1 (1953) which is here requested. The United States Court of Appeals for the District of Columbia in *Communist Party of United States* v. *Subversive Activities Control Board*, — F. 2d — (No. 11850, Jan. 9, 1958), held that the rule in *Jencks* v. *United States*, 353 U. S. 657 (1957), applies to proceedings in administrative tribunals. There is a conflict between the holding below and it.

IV.

An important question in the administration of the draft law is here presented to the Court which has not been heretofore decided by it but which should be determined by it. It is whether the petitioner was denied procedural due process before the appeal board by misleading false statements of fact and unfair representations to the appeal board as a basis for the denial of the conscientious objector claim appearing in the recommendation and in the résumé of the FBI report. The reasons stated in the opinion of the court below for this holding appear in Appendix A, *infra*, at pages 44 to 45.

Upon the last hearing in the Department of Justice the hearing officer made reference to the conviction of the uncle, who raised petitioner, for bootlegging. The hearing officer, however, informed the petitioner that that "wasn't important, that we wouldn't even discuss that." [R. 60]

The Department of Justice in making its final recommendation did not carry out the statement made by the hearing officer to the petitioner that the conviction was not relevant and would not be used. In the recommendation there were referred to and annexed the résumés of the FBI inquiries. These inquiries emphasized to the appeal board the convictions of petitioner's uncle as a bootlegger. [R. 111-112, 119-120] The final recommendation of the Department of Justice to the appeal board nowhere instructs the appeal board not to consider the conviction of the petitioner's uncle. [R. 128-131]

It is submitted that it was highly unfair and prejudicial to petitioner to call to the attention of the appeal board as relevant and material the evidence turned up by the FBI investigation that petitioner's uncle had been convicted of bootlegging. It was entirely irrelevant and immaterial. It had no connection with the sincerity and conscientious objections of the petitioner. Petitioner informed the Department of Justice that he was not responsible for the character and conduct of his uncle. [R. 124] It was incumbent upon the Department of Justice to write the appeal board and specifically direct the appeal board not to regard such highly prejudicial, irrelevent and immaterial fact appearing in the résumé of the inquiry by the FBI.

The résumé of the inquiry dated September 22, 1955, devoted itself mainly to the immoral and disgraceful practices of petitioner's neighbors and his landlady in Wichita, Kansas. [R. 113-121] The résumé on its face showed that the petitioner was not in any degree responsible for or even connected with the immoral and illegal practices of his neighbors and the landlady. [R. 113-121] The landlady, who was convicted for running an abortion ring in the neighbor-

hood, exonerated petitioner in the statement that she made to the FBI. [R. 114] The young girl that was rumored to have been pregnant by some other man and who managed the motel owned by petitioner's landlady also exonerated petitioner. [R. 114-115]

The Department of Justice forwarded this résumé to the appeal board with knowledge that petitioner had absolutely no connection whatever with the immoral and illegal acts of petitioner's landlady and his neighbors in Wichita, Kansas. Knowing as it did that petitioner had no connection with these illegal acts described in the résumé it was the responsibility of the Department of Justice to delete and omit the highly irrelevant, immaterial and prejudicial statements appearing in the résumé. This was specially true after petitioner specifically directed the attention of the Department of Justice to the irrelevancy of such illegal acts and conduct. [R. 125] The Department of Justice, nonetheless, submitted the highly prejudicial, irrelevant and immaterial résumé to the appeal board along with its adverse recommendation. The Department underscored the résumé containing the highly prejudicial, irrelevant and immaterial facts when in its report it informed the appeal board that the résumé was "made a part hereof" and marked the résumé as Exhibit B. [R. 129] The Department having done this without any explanation or instruction to the appeal board, the appeal board could logically assume that the Department of Justice made its adverse recommendation because of the bad character and immoral and illegal acts of petitioner's landlady and neighbors. [R. 129-131]

Section 6 (j) of the Act and the Regulations authorizing the inquiry and recommendation confine the inquiry to the good faith of the registrant. It is the conduct of the registrant that is involved and that alone. What his neighbors know about his sincerity is, of course, relevant and material. But what the FBI agents dig up about the conduct of the registrant's neighbors and other persons, for which he is

not responsible, are not proper matters for inquiry and should not be included in the FBI report or résumé.

The inclusion of the irrelevant, immaterial and poisonous résumé in the draft board record forwarded to the appeal board was damaging. It is as harmful as sending documents to the appeal board behind the back of the registrant. —*Sheats* v. *United States,* 215 F. 2d 746 (10th Cir. 1954); *Gonzales* v. *United States,* 348 U. S. 407 (1955).

The recommendation of the Department of Justice and the résumé constitute a chain in the Selective Service process. (*Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *Sicurella* v. *United States,* 348 U. S. 385 (1955)) The breaking of this chain by the illegal action of the Department of Justice here complained of makes void the I-A classification by the appeal board.—*Sicurella* v. *United States,* 348 U. S. 385 (1955); compare *United States* v. *Romano,* 103 F. Supp. 597 (S.D. N.Y. 1952).

It is submitted that the above question is sufficiently important and of such wide national scope in the administration of the draft law that this Court ought to grant the writ of certiorari to determine it.

V.

The holding of the court below finding that no error was committed by the trial court in excluding from the evidence the longhond notes of the hearing officer and the typewritten report of the hearing officer to the Department of Justice is out of harmony with the holding of this Court in *Jencks* v. *United States,* 353 U. S. 657 (1957), and in direct conflict with *United States* v. *Beekman,* 155 F. 2d 580, 582-584 (2d Cir. 1946); *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir. 1944); and *United States* v. *Krulewitch,* 145 F. 2d 76 (2d Cir. 1944).

The holding of the court below, that *Jencks* v. *United States,* 353 U. S. 657 (1947), does not support the petitioner in his demand for the production of the longhand notes and the typewritten report of the hearing officer for the purpose

of establishing a denial of due process at the hearing in the Department of Justice and to impeach the hearing officer, a witness for the Government, appears at pages 43 to 44, Appendix A, *infra*.

It is to be noted that the court below, in its opinion, inadvertently restricted the assignment of error made by petitioner to the exclusion of the longhand notes made by the hearing officer. See Appendix A, *infra*, at pages 39, 43-44. The statement of points for reversal of the case filed by petitioner in the court below in paragraph IX at page 3 of the record described the point as follows:

> "The trial court committed reversible error in holding that the hearing officer of the Department of Justice, Maurice A. Evenson, was privileged from producing his written report of the hearing conducted by him made to the Department of Justice and in excluding the report from the evidence which was shown to be material and relevant to the issues of the case at the time of the exclusion." [R. 3]

The petitioner in his brief filed in the court below made the point broader. Point Six of the brief was as follows:

> "Reversible error was committed by the trial court in excluding from evidence the longhand notes of the hearing and the report of the hearing officer to the Department of Justice upon the hearing conducted by him, which were material and relevant."

It is submitted that the petitioner was seeking not only the longhand notes made by the witness but also the official typewritten report of the hearing made to the Department of Justice.

Upon the trial the petitioner sought to obtain and put into evidence the longhand notes made by the hearing officer at the hearing and his typewritten report to the Department of Justice about the hearing. [R. 43-47, 47-50, 80, 84-86] The record showed an effort on the part of the peti-

tioner to establish a denial of procedural due process of law by the hearing officer conducting an unfair hearing and in making a biased, untrue and one-sided report of the hearing to the Department of Justice. [R. 16-30, 33-41, 73-78]

The hearing officer was recalled as a witness for the Government and denied two items of the testimony given by petitioner and his witnesses. [R. 82-84] After giving this testimony his credibility was involved, and petitioner, as the record shows, again demanded the notes and the report of the hearing officer for the purpose of impeaching the Government's witness on cross-examination. [R. 83-84]

It has been held that, when the minutes or report made by the hearing officer are needed for the purpose of determining whether there was a denial of procedural due process at the hearing or in the recommendation, the documents can be compulsorily produced, notwithstanding the privilege claimed by the Attorney General, as was done in this case. —*United States* v. *Erikson*, 149 F. Supp. 576, 580 (S.D. N.Y. 1957).

This holding is not in conflict with *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953), where the court quashed a subpoena *duces tecum* commanding the production of the hearing officer's report when it was called for only to show that there was a missing link in the chain of proceedings. The statute and the regulations, the court held, called only for the final recommendation by the Department of Justice. *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953), did not involve a situation where the document was needed to establish the denial of procedural due process of law at the hearing and in the Department of Justice. The case of Bouziden is identical to that of *United States* v. *Erikson*, 149 F. Supp. 576 (S.D. N.Y. 1957), and distinguishable, therefore, from *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953).

The longhand notes and the typewritten report of the hearing officer were relevant when first demanded, because petitioner intended to use them to corroborate the testimony

of his witnesses that the hearing officer had denied a full and fair hearing. (*United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944)) When the hearing officer took the stand and attempted to contradict the testimony of petitioner and his witnesses the longhand notes and the report of the hearing officer to the Department of Justice became more vitally material and relevant.—*United States* v. *Beekman*, 155 F. 2d 580, 582-584 (2d Cir. 1946); *United States* v. *Krulewitch*, 145 F. 2d 76, 78-79 (2d Cir. 1944); *Jencks* v. *United States*, 353 U. S. 657, 671 (1957).

In the event that this Court does not find that the holding below is out of harmony with *Jencks* v. *United States*, 353 U. S. 657 (1957), or that there is no conflict between the holding of the court below and the decisions of the other courts of appeals on this question, then it is respectfully submitted that this is such an important question of great national scope in the administration of the criminal sanctions clause of the draft law that this Court ought to grant the writ of certiorari in order to determine the question.

VI.

The holding of the court below is out of harmony with *Jencks* v. *United States*, 353 U. S. 657 (1957), when it approved the ruling of the trial court excluding the FBI report from evidence, which was offered for the purpose of determining whether or not the Department of Justice denied the petitioner a full and fair hearing by withholding favorable evidence from the appeal board.

The holding of the court of appeals that *United States* v. *Nugent*, 346 U. S. 1 (1953), precludes the compulsory production of the FBI report at the trial even when it is sought to establish a denial of procedural due process before the appeal board by the Department of Justice in withholding from the appeal board favorable evidence developed by the FBI inquiry appears at pages 40 to 43, *infra*, Appendix A.

At the trial the petitioner contended that the Department of Justice had not forwarded to the appeal board in the

résumé all the favorable evidence that had been turned up by the FBI inquiry. Compare the résumé with the contention that it was inadequate. [R. 110-121; see also 52-56]

Upon the trial it appeared that the hearing officer had the original FBI report before him and that the original of it was sent to the Department of Justice in Washington along with the recommendation of the hearing officer and his report of the hearing. [R. 50, 126] The proof showed that the résumé supplied to the petitioner was only one-fourth the size of the original FBI report. [R. 50-51] The trial court on two occasions sustained the objection of the Government and ruled that the FBI report was not material or relevant. [R. 52-56, 80-82]

At the trial when the FBI report was offered and upon the appeal the petitioner contended that the FBI report was relevant to show that he had been denied procedural due process of law before the appeal board because the Department of Justice did not provide the petitioner and the appeal board with summaries of all the favorable evidence appearing in the FBI report so as to overcome the adverse recommendation made to the appeal board and also to show that there was no basis in fact for denying the full conscientious objector claim. This was a fact issue in the district court. The question was whether the petitioner was wrongly denied the right to make proof when the ruling was made refusing to compel the production of the FBI report for the purpose of comparison of it with the summaries provided by the Department of Justice to the petitioner and to the appeal board.

The trial court, without ever seeing the FBI report and relying alone upon a reading of the summary arbitrarily held—after denying the petitioner the right to prove to the contrary—that the summary was adequate. This Court has prohibited any speculation in determining whether the draft boards and the Department of Justice have complied with the procedural due process requirements.—*Simmons* v. *United States*, 348 U. S. 397, 404-406 (1955); *Gonzales* v.

United States, 348 U. S. 407, 414-417 (1955); compare *Steele* v. *United States,* 240 F. 2d 142 (1st Cir. 1956).

The court below approved the ruling of the trial court, excluding the FBI report and held that the petitioner was not entitled to prove that he was denied procedural due process of law through the failure of the Department of Justice to make a full and fair summary of the favorable evidence in each case. This ruling of the court below is in conflict with *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944); *United States* v. *Krulewitch,* 145 F. 2d 76 (2d Cir. 1944); and *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir. 1946).

It may be argued by the Government that this Court must rely upon the presumption of regularity in administrative proceedings. Notwithstanding *Koch* v. *United States,* 150 F. 2d 762, 763 (4th Cir. 1945), and *United States* v. *Fratrick,* 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, petitioner says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

In *Jones on Evidence in Civil Cases,* Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop* v. *United States,* 165 U. S. 486 (1897), and *Edwards* v. *United States,* 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions. It is submitted, therefore, that it cannot be said, as did the trial court in this case, that the Department of Justice is presumed to have made full and complete summaries of all the favorable evidence.

This ruling of the court below, denying petitioner the right to show a violation of procedural due process by the Department of Justice in withholding evidence from the appeal board, is out of harmony with *Jencks* v. *United*

States, 353 U. S. 657, 761, (1957). There a statement given to the FBI by a witness against the defendant was held to be relevant to test the accuracy of his testimony. Here the summary of the FBI report was a "witness" against the petitioner in the appeal board. In the trial court, as a basis for acquittal, the petitioner contended that vital and important evidence favorable to his conscientious objector claim was omitted in the summary sent to the appeal board, thus denying procedural due process of law. This was not fair and just. Section 1 (c) of the Act (50 U. S. App. § 451 (c); see *supra,* page 5) provides for "a system of selection which is fair and just."

Petitioner to prove such denial of due process was entitled to test such summary, as a "witness" against him on his conscientious objector claim. He is allowed by due process of law in the district court to see whether such "witness" omitted important and material evidence supporting his conscientious objector claim that should have been given to the appeal board and exculpating him from the adverse recommendation made by the Department of Justice to the appeal board. It may very well be that a comparison of the FBI report with the summary made of it to the appeal board will show a vital omission. But assume it will not. In any event the petitioner was entitled by procedural due process of law in the district court to attempt to prove the denial of due process by the Department of Justice in the draft board proceedings. Yet he was denied this right in the district court to call his "witnesses" (the FBI report), by the ruling of the trial court.

It must be conceded that, in the trial of all conscientious objector cases under the Act, there is an issue of procedural due process in Department of Justice proceedings. It is to determine whether the Department of Justice has broken the link in the procedural chain by denying procedural due process of law. This was so held in *Gonzales* v. *United States,* 348 U. S. 407 (1955); *Simmons* v. *United States,* 348 U. S. 397 (1955); and *Sicurella* v. *United States,* 348

U. S. 385 (1955). There is still another way by which the Department may deny procedural due process of law. It is by concealing or holding back from the consideration of the appeal board favorable evidence supporting petitioner's conscientious objector claim. This is through making an incomplete or inaccurate summary of the original FBI reports, suggested in *United States* v. *Nugent*, 346 U. S. 1 (1953).

Since this is an issue for the district court trying the conscientious objector cases to decide, the question inevitably arises: How can the trial court determine whether the Department of Justice withheld evidence by making an incomplete summary? The question answers itself: By a mere comparison of the documents with the summaries thereof.

Even the court in *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), admitted this by a statement made in its opinion. The court said: "Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a resume without looking at the documents it purports to summarize." See 247 F. 2d at page 620. The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is full and fair without reading the book? The judicial function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a fair summary of the favorable evidence was given until the FBI report, which was summarized, is produced for comparison.

A question similar to that presented here was submitted to this Court in *Simmons* v. *United States*, 348 U. S. 397 (1955). Read what this Court said in the last paragraph of that opinion. (348 U. S. at page 406) It was presented to this Court in other cases. See footnote 3 of the opinion in *Blalock* v. *United States*, 247 F. 2d at page 621. The denial of certiorari in those cases is insignificant.—*United States* v. *Carver*, 260 U. S. 482, 490 (1923); compare special concur-

ring opinion of Mr. Justice Frankfurter in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912 (1950).

In *Simmons* v. *United States,* No. 251, October Term, 1954 at page 17 of the Memorandum of the United States in Opposition, Judge Sobeloff (author of the opinion in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957)) (then Solicitor General) told this Court: "However, if the Court does not deem this issue determined by *Nugent,* we would not oppose the grant of certiorari on this point, in view of the series of contrary district court rulings which the government has been unable to appeal since refusal to disclose has resulted in judgments of acquittal."[1] Since the date of the decision in *Jencks* v. *United States,* 353 U. S. 657 (1957), the United States District Court for the Western District of Washington in *United States* v. *Jacobson,* 154 F. Supp. 103 (W. D. Wash. 1957), decided the identical issue present here in conflict with the decision of the court below. This continuing conflict between the district courts in many parts of the country with the decisions of the courts of appeals is still of sufficient importance to justify the granting of the writ in these cases.

Generally the same cases cited by the court in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957), in footnote 3 of the opinion may be distinguished. This is because they involved an attempt to subpoena the FBI report for the purpose of showing that adverse evidence against the registrant was withheld at the hearing in the Department of Justice. The reason they are distinguishable is that here the FBI report is needed to determine whether favorable evidence has been withheld from the appeal board. In the cases referred to involving the withholding of unfavorable evidence at a hearing, it may be said the situation is dif-

[1] See the district court opinions: *United States* v. *Edmiston,* 118 F. Supp. 238, 240 (D. Neb. 1954); *United States* v. *Evans,* 115 F. Supp. 340, 343 (D. Conn. 1953); *United States* v. *Stull,* No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States* v. *Stasevic,* 117 F. Supp. 371 (S. D. N. Y. 1953); *United States* v. *Parker,* No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, Butte Div., Nov. 30, 1953.

ferent from the case here where favorable evidence is held back.[2] It may also be said, but not admitted, that the registrant is not unduly harmed in the administrative proceedings by withholding unfavorable evidence at the Department of Justice hearing. The reason may be that the written summary of the unfavorable evidence is all that reaches the appeal board and the registrant has the right to answer that before the appeal board. (*Gonzales* v. *United States,* 348 U. S. 407 (1955)) He has no way, however, of overcoming the prejudice done by holding back and not making known to him and to the appeal board of the favorable evidence.

Petitioner suggests that it may be that the reason the petition for writ of certiorari was denied in *White* v. *United States,* 348 U. S. 970 (1955), after the statement made in the last paragraph of the opinion in *Simmons* v. *United States,* 348 U. S. 397, 406 (1955), was that the procedure established that day in *Gonzales* v. *United States,* 348 U. S. 407 (1955), would thereafter prevent the question from again arising or would be a sufficient guarantee against the denial of due process in cases involving unfavorable evidence not given to the registrant at the Department of Justice hearing.

The denial of certiorari in *White* v. *United States,* 215 F. 2d 782 (9th Cir. 1954), cert. denied, 348 U. S. 970 (1955), may have been based on the proposition that the résumé of the adverse evidence spoke for itself and there was no need to look at the FBI report to determine whether the registrant was harmed because he had the opportunity to answer the only adverse evidence before the Department of Justice that was used before the appeal board. Compare *United States* v. *Nugent,* 346 U. S. 1 (1953), with *Gonzales* v. *United States,* 348 U. S. 407 (1955). The question decided in *White* v. *United States,* 215 F. 2d 782 (9th Cir. 1954), cert. denied 348 U. S. 970 (1955), was presented to this

[2] Petitioner does not admit that the holdings by the courts of appeals cited in footnote 3 of the *Blalock* opinion are correct.

Court but not decided in *Simmons* v. *United States,* 348 U. S. 397, 406 (1955).

An entirely different question arises when, as here, the federal courts are called upon to determine whether all the *favorable* evidence has been presented by the Department of Justice to the registrant and to the appeal board. On such an issue the harm or prejudice done to the registrant by the Department of Justice is not an act of commission that the registrant can answer but is an act of omission that the registrant has no way of protecting himself against. Where adverse evidence is used in the Department of Justice or before the appeal board, the rights of the registrant may be said to be adequately protected by the right to answer the unfavorable evidence made known to the registrant. Since his right in respect to the adverse evidence is protected by the right to reply to it before the appeal board, there is no need to subpoena the FBI report to determine if all the unfavorable evidence has been divulged, although petitioner does not concede this since the question is still open in this Court. See *Simmons* v. *United States,* 348 U. S. 397 (1955), and *Gonzales* v. *United States,* 348 U. S. 407 (1955). But in the case of withholding favorable evidence the situation is just the reverse of that involving adverse evidence used before the appeal board. This vast difference makes entirely inapplicable the arguments and reasons relied upon by the Government and by the courts of appeals for not producing the FBI reports at the trials where the only question involved is the use of unfavorable evidence. —*Campbell* v. *United States,* 221 F. 2d 454 (4th Cir. 1955); *Simmons* v. *United States,* 213 F. 2d 901 (7th Cir. 1954) (reversed on other grounds, 348 U. S. 397 (1955)).

The court below grounded its decision in this case upon *United States* v. *Nugent,* 346 U. S. 1 (1953). That decision gives no support for the holding in this case. *Nugent* involved only the question of whether all the adverse evidence in the FBI report should be given to the registrant during the administrative proceedings by sub-

mitting the original report to him. The Court held that giving a summary of the adverse evidence was sufficient. The question of whether the defendants in that case had the right to subpoena the FBI report at the trial was not determined, although it was raised in the brief filed in this Court.

Petitioner is making a complaint under another point in this petition that the original FBI report was not given to him in the administrative proceedings. He says under this point that the summary of the report was inadequate and thus favorable evidence was withheld from the appeal board denying procedural due process and that the FBI report is material to determine that point. The *Nugent* case (346 U. S. 1) did not decide whether the FBI reports could be subpoenaed in the trial court for the purpose of testing the résumés made to the appeal board. No such résumé was even made in the *Nugent* case. That question was also undecided in that case, the same as it was in *Simmons* v. *United States*, 348 U. S. 397, 406 (1955).

Since the question was not decided by this Court in *Nugent* (346 U. S. 1 (1953)), then how can the Court of Appeals amend the decision of this Court in *Nugent* (346 U. S. 1 (1953)) by saying that it was decided? The very fact that the decision of the court below is based upon a nonexistent holding by this Court in *United States* v. *Nugent*, 346 U. S. 1 (1953), is itself a sufficient reason for granting the writ of certiorari in this case. Consider also the last two paragraphs of the opinion of the court in the *Blalock* case (247 F. 2d 615, 621), where the court indicates its extreme uncertainty about its holding.

It is submitted that the writ should be granted because (1) the decision of the court below is in direct conflict with *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir. 1946); *United States* v. *Krulewitch*, 145 F. 2d 76 (2d Cir. 1944); and *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), and (2) the decision below also is out of accord with *Jencks* v. *United States*, 353 U. S. 657 (1957). See also the Act of Congress printed as Appendix D at pages 51 to 53,

infra. In the event that this Court does not so find, then it is submitted that, for the reasons above stated, the question is of such wide public and general national importance in the administration of the criminal sanctions clause of the federal draft law as to warrant a granting of the writ.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

February, 1958

APPENDIX A

Opinion

(January 29, 1958)

Hayden C. Covington for Appellant.

Philip R. Douglas, Assistant United States Attorney, (Paul W. Cress, United States Attorney, was with him on the brief) for Appellee.

Before BRATTON, Chief Judge, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Bouziden stands convicted of refusing to submit to induction into the armed forces. 50 U.S.C.A. 462. He seeks relief from the judgment and sentence urging that the trial court twice refused, prejudicially, to properly apply the rule and philosophy announced in Jencks v. United States[1] and further erred in failing to recognize the denial of procedural due process in the administrative channels leading to his classification as 1-A. The contentions are interlaced in law and fact.

Bouziden is a member of Jehovah's Witnesses. Asserting subjective sincerity in his belief in the teachings of that religion, appellant filed a draft classification questionnaire on March 4, 1952, claiming exemption from conformable military service. The local draft board refused him classification as a minister of religion (IV-D)[2] and similarly rejected his claim to a 1-O classification, that of a conscientious objector. Bouziden appealed his 1-A status and his file was referred to the Department of Justice for investigation and recommendation in accordance with 50 U.S.C.A. 456 (j). That Department recommended to the appeal board that Bouziden be denied classification as a conscientious objector, noting in its report that the applicant believed in theocratic

[1] 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103.

[2] This action is not now questioned.

warfare and was willing to fight in self defense.[3] The appeal board classified him 1-A and he refused to submit to induction on May 25, 1953. Prosecution was begun but dismissed and appellant's file was referred to and reopened at the local board level.

On May 4, 1955, the local board again classified appellant 1-A, and upon his appeal, his file was again forwarded to the Department of Justice. The Federal Bureau of Investigation made inquiry and observation of Bouziden's background and associates and submitted a report to the departmental hearing officer and a résumé to appellant. Appellant requested that the hearing officer send a copy of the full F.B.I. report to the appeal board and another copy to him. This was not done.

Appellant considered the F.B.I. résumé to be unfair and wrote the hearing officer to that effect. Particular complaint was made of statements questioning the moral conduct of certain of appellant's acquaintances and relatives, activities of which appellant asserted he had no knowledge. The résumé contained statements of witnesses favorable to appellant as well as those who thought him not sincere in his religious beliefs. Sincerity of belief is the essence of the inquiry made by the Department of Justice. Bradshaw v. United States (10 Cir.) 242 F. 2d 180.

On September 22, 1955, a hearing was held during which both appellant's wife and the hearing officer took notes of the occurrence. The hearing officer reported unfavorably upon appellant's sincerity claim, the Department of Justice recommended against his request to be classified as a conscientious objector, the appeal board classified him as 1-A, and the local board ordered him to report for induction on July 24, 1956. He refused to submit to induction and this prosecution followed.

Trial was had to the court sitting without a jury. Appel-

[3] Such beliefs are not grounds for a denial of a 1-O classification. Sicurella v. United States, 348 U. S. 385, 75 S. Ct. 403, 99 L. Ed. 436; Annett v. United States (10 Cir.) 205 F. 2d 689.

lant again sought production of the entire F.B.I. report and his demand was again refused. He asserts this to be error compounded, claiming the right to the report both in the instant case and during the course of the precedent administrative proceedings.

Against this assertion that the Fifth Amendment grants the applicant the right to inspect the investigator's reports, it was held in United States v. Nugent, 346 U. S. 1, 73 S. Ct. 991, 97 L. Ed. 1417, that the Justice Department satisfies its statutory and constitutional duties when it supplies a registrant with a résumé of any adverse evidence and permits him to produce all relevant evidence in his own behalf before an impartial hearing officer. The hearing outlined by the statute is not an all-out trial wherein the registrant may collaterally attack the testimony obtained in the prehearing investigation.

Since the Nugent case was not expressly overruled by Jencks v. United States, supra, appellant seeks first to distinguish his case from the Nugent case and bring it within the rule of the Jencks case and second to show that the Nugent case was indirectly overruled by the Jencks decision.

Appellant sought the production of the complete investigative reports in the trial of his criminal prosecution for failing to submit to induction after having been so ordered by his local board. Therefore, he avers that the question is not whether the hearing was conducted by the appeal board in accordance with the standards of due process, as in Nugent, but rather goes to his right to those records in defense of a criminal action in an attempt to show that the order of the board was baseless in fact and hence unlawful. This theory has twice been tested in the federal system since the Jencks decision, the two courts arriving at opposite conclusions in United States v. Jacobson (D.C. W.D. Wash.) 154 F. Supp. 103 and Blalock v. United States (4th Cir.) 247 F. 2d 615.

In the Jacobson case, the District Court emphasized the fact that although only the resume was submitted to the

appeal board and that board made its final determination without considering the full F.B.I. reports, the two recommendations from the Justice Department were probably highly influential and had been made by men who had studied the full reports. It was that court's opinion that the Jencks case required that the F.B.I. reports in their original form be produced for the defendant's inspection or that the prosecution be dismissed.

The court further recognized that the inevitable result under this view would be to entitle the registrant to the files in a criminal prosecution which were closed to him before the administrative bodies, thus nullifying the clear distinction drawn between the original reports and the résumé in Nugent, but dismissed this argument as not being in accord with the philosophy of Jencks.

On the other hand, the Fourth Circuit adhered to the view of the Nugent case in Blalock stating:

> "The history of the treatment of F.B.I. reports, both in Nugent and in other cases, however, indicates the sharp distinction between applications by defendants in ordinary criminal cases to examine statements made to the F.B.I. by witnesses called to the stand by the Government, and demands for the production of such reports in conscientious objector cases. It is arguable that the résumé furnished the accused in a Selective Service case is like a witness; that the résumé should be subject to testing for fairness and completeness by a process similar to that applied to a witness whose testimony may be impeached by showing prior conflicting statements. Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a résumé without looking at the documents it purports to summarize . . . However plausible these contentions, we cannot accept them, for the point was considered and rejected in Nugent."

And further that:

> "Whatever may be the boundaries and limitations of the Jencks doctrine, we think it clear that it is subject to the qualification of the Nugent case for the type of problem here involved, that is, testing the accuracy of the résumé furnished in conscientious objector cases, in contrast to impeachment of witnesses in criminal cases. The Nugent case explicitly holds that if the defendant was furnished a résumé and accorded an opportunity to be heard, he cannot complain that he was not shown the investigative records, nor can he insist on their production at the criminal trial."

Appellant was informed of all adverse information and conclusions destined for consideration by the board of appeal; he was granted a hearing and permitted to enter rebutting evidence for the board's consideration. He does not contend that under the Nugent doctrine he has a right to collaterally attack or impeach the informants; he desires to examine the original reports in order to determine whether or not the board received a fair and full report of all favorable information received by the F.B.I.

In thus claiming his right to the reports, appellant neglects the consideration that the burden is his in all stages of the classification proceedings to show that he is entitled to the grace of statutory exemption. Bradshaw v. United States, supra. The Department of Justice is under the duty of investigating, informing him of evidence against him, and holding a hearing to permit him to explain, rebut or overwhelm such evidence. The Department does not hold a position of advocacy either to maintain or defeat his classification claim; it merely acts as a preliminary hearing body with powers of independent investigation for the purpose of advising the appeal board. In this the F.B.I. reports perform an entirely different function than when they are made with the objective of prosecution. In the Jencks case, the government must make an election as to whether to permit

access to the secret files which it intends to use in prosecution, base its case on other evidence, or, if it has no other evidence, dismiss the action. Such is not the present situation. Without the special dispensation allowed the conscientious objector, his classification would follow that of other young men in his situation. The procedures to test his sincerity are a part of the statute and his classification is subject to them.

The fact that the Justice Department's recommendation forms a part of the record and the complete file is not before the board of appeals does not make the board's action unlawful (since this is the determinative procedure set by statute) if there is a basis in fact to be found in the whole record. The record does not change complexion because the applicant chose to disregard a lawful order of the board and thus subject himself to criminal prosecution. The exploration of the sincerity of the applicant's belief is made the duty of the local board, the appeal board and the Department of Justice and the court may not substitute its judgment of this subjective fact where the determination has some basis in objective fact. Estep v. United States, 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 567.

We hold that appellant was neither entitled to the full F.B.I. reports during his classification proceedings, United States v. Nugent, supra, nor during his trial, United States v. Blalock, supra.

Among the witnesses called by the government in aid of prosecution was the Department of Justice hearing officer before whom Bouziden had appeared. The witness testified as to events which transpired at the hearing, his testimony conflicting in part with that of Mrs. Bouziden upon the same subject. On cross examination, the government's witness stated that at the time of the hearing he had made notes in longhand (as had Mrs. Bouziden) and that he had the notes with him on the witness stand. Appellant requested the court to require the witness to produce the notes for examination for possible impeachment. The request was denied.

Relying again upon Jencks, supra, appellant cites this ruling as error requiring reversal.

At the outset it may be noted that the factual background of Jencks may be clearly distinguished from that herein considered. In Jencks the reports sought were made during the investigation of the crime charged and with the view of prosecution. Here, the notes were made by an impartial hearing officer performing a function of statutory nature. In Jencks, the reports were official in nature and communicated as such. Here, the notes were but a personal aid to one performing a quasi-judicial function and totally uncommunicated. In Jencks, the reports were in the official possession of the prosecution. Here, the notes were in the possession of a witness over whom the government may well have no control.

But more important is our opinion that the rationale of Jencks is neither intended to reach the instant case nor should it be so extended. Under the rule of the Jencks case the government must make its choice to prosecute or refrain, to produce or refuse, to punish or release in accordance with its judgment as to how the public good will be best served. And under the facts of Jencks the government has control and knowledge of the factors upon which its decision as to the public good must rest. In the instant case the prosecution had neither knowledge of nor control of the hearing officer's notes. We do not interpret Jencks as applying to personal writings of government witnesses. The refusal of the trial court to direct the hearing officer to surrender his notes, in the absence of a showing of value for impeachment or that the witness was testifying or had refreshed his memory from the notes, was well within the trial court's wide discretion under the general rules of evidence.

Appellant's remaining assignments of error attack the F.B.I. résumé and the Department of Justice report as containing "unfair representations and illegal grounds for the denial of the conscientious objector claim" and also as making "serious omissions of facts favorable to the appellant"

all of which led the action of the appeal board to be without basis in fact. The scope of our review in this regard is extremely limited.

"It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of designated agencies. Nor should they look for substantial evidence to support such determination." Dickinson v. United States, 346 U. S. 389, 74 S. Ct. 152, 98 L. Ed. 132.

To determine whether or not a person is sincere in a particular religious belief is a most difficult task which can never be the subject of complete satisfaction. And to judge a person's religious sincerity by the acts and conduct of relatives and other persons may be extremely unfair. Truly a man may be a pillar of religious devotion and have a brother who is a reprobate. But the exploration of subjective sincerity is imperspicuous by definition and we cannot say that prolonged and intimate association with the immoral does not probe the subject. It may. As to whether it does in a particular case of this nature we leave to others as the rule requires. Similarly we note that the hypocrite may attend formal religious services without fail and the pure in heart may not; the liar may be direct in his answers and the personality of a truthful man may give a false impression of evasiveness. But the converse may be true and perhaps more often is. During the administrative process this appellant was designated as being evasive in answer, associating with persons of poor moral character and serving his church with irregularity. We conclude that the action of the draft board is not, as a matter of law, without any basis in fact.

The recommendation of the Department of Justice contained the statement that applicant was not opposed to theocratic wars or self defense. The type of reasoning which leads to the conclusion that an applicant cannot be conscientiously opposed to warfare if he holds such beliefs has been denominated an error of law which vitiates the entire proceedings. Sicurella v. United States, supra. Such a belief

cannot be considered as nullifying a conscientious objection to warfare nor as forming the basis for rejection of the application, Annett v. United States, supra. However, the statement of the applicant's beliefs contained in the body of the report is clearly relevant for consideration and the hearing officer's recommendation does not rely on the erroneous standard of Bouziden's willingness to fight in theocratic warfare but rests on the total view of the applicant's sincerity.

Finally, appellant asserts that the first report of the F.B.I. and the recommendation of the Department did utilize this improper standard and was never formally retracted, so tainting the present proceedings as to void them. Since the original prosecution was dismissed and appellant's draft status considered de novo, we are in simple accord with the trial judge's statement that there is no reason to believe that appellant's ultimate classification was influenced improperly.

The judgment is affirmed.

APPENDIX B

Judgment

Seventeenth Day, January Term, Wednesday, January 29th, 1958.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Jimmy James Bouziden, appellant, surrender himself to the custody of the United States Marshal for the Western District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

APPENDIX C

Section 1622.11 of the Regulations (32 C. F. R. § 1622.11; E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

§ 1622.11 *Class I-A-O: Conscientious objector available for noncombatant military service only.* (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; E. O. 10420, 17 F. R. 11593, Dec. 19, 1952) reads as follows:

§ 1622.14 *Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociologi-

cal, or philosophical views or a merely personal moral code.

(Section 1622.14 (b) contained in E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.)

Sections 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Regulations (32 C. F. R. §§ 1626.25 (a), 1626.25 (b) and 1626.25 (c); E. O. 10363, 17 F. R. 5456, June 18, 1952) read as follows:

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal

board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.

APPENDIX D

Criminal Code Amendation
Public Law 85-269
85th Congress, S. 2377
September 2, 1957

AN ACT

To amend chapter 223, title 18, United States Code, to provide for the production of statements and reports of witnesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

"§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The analysis of such chapter is amended by adding at the end thereof the following:

"3500. Demands for production of statements and reports of witnesses."

Approved September 2, 1957.